Supreme Court, U. S.
FILED
AUG 30 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-358

FARRELL LINES INCORPORATED,
Petitioner,

against

ANTHONY CANIZZO, UNIVERSAL TERMINAL AND STEVEDORING CORP., and FRANK J. HOLLERAN, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE W. SULLIVAN
Attorney for Petitioner
17 Battery Place
New York, New York 10004

JEFFREY V. BOXER
LILLY, SULLIVAN & PURCELL, P.C.
of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Statutory Provisions Involved	2
Statement of the Case	4
Reasons for Granting the Writ:	
I—The decision below conflicts with the decisions of other courts of appeals as to the standard of care to be applied in personal injury suits under 33 U.S.C. 905(b)	7
II—The conflict in opinions between different panels of the Second Circuit Court of Appeals requires intervention by this Court and exercise of its supervisory powers	11
III—The decision below raises significant and recurring problems concerning the standard of care to be utilized in New Act cases	12
Conclusion	13
Appendix:	
Opinion of the Court of Appeals	1a
Opinion of the District Court	21a
Judgment of Court of Appeals	35a
Restatement (Second) of Torts § 343-343A (1965)	37a

Cases: PAGE

Anuszewski v. *Dynamics Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976), cert. denied, 429 U.S. 1098 (1977) 8

Brown v. *Ivarans Rederi A/S*, 545 F.2d 854 (3d Cir. 1976), cert. denied, 430 U.S. 969 (1977) 9

Brown v. *Mitsubishi Shintaku Ginko*, 550 F.2d 331 (5th Cir. 1977) 9

Chavis v. *Finnlines Ltd., O/Y* (4th Cir. decided May 22, 1978, Docket No. 77-1126) 8, 10

Cox v. *Flota Mercante Grancolombiana, S.A.* (2d Cir. dec. May 10, 1978, Docket No. 77-7338) 6, 8, 9, 10, 11, 12

Davison v. *Pacific Inland Navigation Co., Inc.*, 569 F.2d 507 (9th Cir. 1978) 9

Gay v. *Ocean Transport & Trading Ltd.*, 546 F.2d 1233 (5th Cir. 1977) 9

Hurst v. *Triad Shipping Company*, 554 F.2d 1237 (3rd Cir. 1977), cert. denied, 46 U.S.L.W. 3218 (1977). 9, 10

Lubrano v. *Royal Netherlands Steamship Company*, 572 F.2d 364 (2d Cir. 1978) 8

Marant v. *Farrell Lines, Inc.*, 550 F.2d 142 (3d Cir. 1977) 10

Munoz v. *Flota Mercante Grancolombiana, S.A.*, 553 F.2d 837 (2d Cir. 1977) 7

Napoli v. *TransPacific Carriers Corporation*, 536 Fed. 2d 505 (2d Cir. 1976) 8

Riddle v. *Exxon Transportation Co.*, 563 F.2d 1103 (4th Cir. 1977) 8, 9, 10

Teofilovich v. *D'Amico Mediterranean/Pacific Line*, 415 F.Supp. 732 (C.D.Cal. 1976) 9

Statutes and Rules: PAGE

Longshoremen and Harbor Workers Compensation Act, Title 33 U.S.C.:

Section 905 (b) 2, 3, 6, 7

941 (a) 3

29 C.F.R. 1918.19(c) 5

Other Authorities:

Restatement of Torts 2nd:

Section 343-343A 5, 7, 8, 9, 10

Section 409 10

House Report No. 1441 (Education and Labor Committee) U.S. Code Congressional and Administrative News; 42nd Cong. 2d Sess. Page 4698 (1972) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

FARRELL LINES INCORPORATED,

Petitioner,

against

ANTHONY CANIZZO, UNIVERSAL TERMINAL AND STEVEDORING CORP., and FRANK J. HOLLERAN, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Farrell Lines Incorporated, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Second Circuit decided June 2, 1978.

Opinions Below

The Opinion of the Court of Appeals in Farrell Lines Incorporated v. Anthony Canizzo, Universal Terminal and Stevedoring Corp., and Frank J. Holleran, Inc., is not yet officially reported and appears in the Appendix. The Opinion of the United States District Court for the Southern District of New York is not officially reported and appears in the Appendix.

Jurisdiction

The Decision of the United States Court of Appeals for the Second Circuit was entered on June 2, 1978. The decision affirmed a finding by the District Court of vessel liability and reversed and remanded for a redetermination of damages. A stay of the mandate was granted on July 6, 1978 on consent of all parties pending the filing of this petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Jurisdiction in the District Court was invoked by virtue of 28 U.S.C. 1333 and the case was tried without a jury pursuant to F.R. Civ. P. 38(e).

Questions Presented for Review

1. Under the 1972 Amendment to 33 U.S.C. 905(b), can a vessel owner be found liable for injuries to a longshoreman caused by an unsafe condition which the vessel owner could assume would be remedied by the independent contractor even though a crew member may have acquired knowledge of it?

2. Is a finding which imputes liability to a vessel owner based on the probability that a crew member should have seen a potentially unsafe condition, which could have been remedied by the independent contractor, clearly erroneous?

3. Was the dismissal of the indemnity and contribution claims against the contractors in this case clearly erroneous?

Statutory Provisions Involved

UNITED STATES CODE; TITLE 33 § 905(b).

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages

by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter. As amended Oct. 27, 1972, Pub.L. 92-576, § 18(a), 86 Stat. 1263.

§ 941(a)

Every employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter and shall install, furnish, maintain, and use such devices and safeguards with particular reference to equipment used by and working conditions established by such employers as the Secretary may determine by regulation or order to be reasonably necessary to protect the life, health, and safety of such employees, and to render safe such employment and places of employment, and to prevent injury to his employees. However, the Secretary may not make determinations by regulation or order under this section as to matters within the scope of title 52 of the Revised Statutes and Acts supplementary or amendatory thereto, the Act of June 15, 1917 (ch. 30, 40 Stat. 220), as amended or section 1333(e) of Title 43.

Statement of the Case

On January 12, 1973, petitioner's vessel the SS AFRICAN COMET, was berthed at Pier 5, Port Authority, Brooklyn, New York. The vessel was loading cargo. Respondent Universal, an expert independent contract stevedore, was employed by Farrell to load various hatches of the vessel. Respondent Holleran, an expert independent lashing and carpentry contractor, was employed by Farrell to provide separate lashing and carpentry gangs to secure and lash the cargo loaded by Universal. Both Universal and Holleran provided their own employees, foremen and equipment to perform their respective work. Canizzo was employed by Holleran in one of the carpentry gangs.

The loading commenced at approximately 8:00 A.M. on that day. Respondent Canizzo was working in various hatches between 8:00 and 5:00 P.M. Between 1:00 and 1:30 P.M. locomotives were loaded by Universal on the inshore and offshore sides of the No. 6 hatch. The stevedores left a walkway *on either side* of the locomotives. There were no potentially unsafe conditions in either area prior to the time when the locomotives were loaded and in fact immediately afterwards. A lasher employed by Holleran claims that he observed an area of grease, with wires on top of it, in the walkway adjacent to the inshore locomotive after 1:30 P.M.

At 5:15 P.M. Canizzo was traversing the area between the locomotive and the inshore hatch coaming. As he walked between the two, he stated "after I took a few steps I slid and I stumbled and I tried to get my balance, I couldn't, and I fell over on my hands and knees, hurting my right hand and my left leg." After the accident he observed grease on his overalls and that "there were a few wires there with grease on them and cluster lights with the wire hanging, you know, all messed up."

At the time of this alleged accident, the contractors were performing loading and securing work in the hatch and on the locomotive. Their employees were working in the area all day.

There was no testimony that the vessel's crew placed cluster lights in that area or had anything to do with the grease, although an inference was drawn by the District Court from conflicting and speculative testimony that a member of the crew placed the cluster lights there.

The District Court found the vessel negligent because the crew member, by placing the cluster lights in the area on top of other wires and grease, contributed to the potentially unsafe condition. It also found that the unidentified crew member who placed the cluster lights should have seen the grease. The basis of the finding of vessel's liability was Restatement of Torts (Second) 343-343A. (37a)

William Davis, the superintendent of the stevedores, and Jack Holleran, the owner/president of Holleran, both testified that if any debris or grease accumulated in their working area their men would clean it up. Davis indicated that his men kept the walkway clear. In fact, he was there as late as 4:30 in the afternoon during that day and made sure that the walkway was clear. If grease had accumulated on the site of the accident, the responsibility for removing it or warning workers about it rested primarily on these independent contractors who had assumed this function. As indicated in the dissent filed by Judge Friendly, the ship "would therefore certainly not have been negligent if it merely failed to discover the existence of the grease within the hours this assertedly accumulated."

Under traditional principles, namely the contractors' warranty to perform their work in a workmanlike fashion, and compliance with safety and health regulations for longshoring, 29 C.F.R. 1918.19(c), requiring slippery conditions to be eliminated as they occur, the responsibility for this

potentially unsafe condition remained with the contractors. Thus, even if we accept the lower Court's finding that an unidentified crew member should have seen the grease, there was no reason to think, as noted by Judge Friendly, that the independent contractors, who were primarily responsible for the safety of their workers, would not take care of the problem as they were bound to do. Certainly, at the very least, the vessel's indemnity and contribution claim against the contractors should have been sustained. While Holleran was entitled to the 905(b) statutory immunity from suit, the cause of action against it, in the instant case, was based on the fact that it employed both a lashing and a carpentry gang with separate foremen, workers and tools. Because of the negligence of the lashers, which resulted in an injury to a carpenter, Holleran could not claim the statutory immunity. The immunity from suit granted to employers under section 905(b) only covers the situation where the negligence of *fellow workers* causes an injury, not every worker engaged in providing a service to the vessel, i.e., those engaged in the same service being provided to the vessel.

The lower Court found Farrell liable and dismissed the cross-claim against co-defendants Universal and third-party defendant Holleran, and found Canizzo 40% contributorily negligent. The net verdict amounted to $65,628.60.

The Court of Appeals, by a divided panel, affirmed the decision on liability and reversed and remanded a portion of the damages to be redetermined by the lower Court. Judge Friendly dissented from the holding as to liability. The decision of this panel was filed three weeks following the decision in *Cox* v. *Flota Mercante Grancolombiana, S.A.* (2d Cir. dec. May 10, 1978, Docket No. 77-7338, petition for writ of certiorari filed October term, 1978, Docket No. 78-72). It was recognized in both the majority and minority *Canizzo* opinions that the decision in *Canizzo* cannot be reconciled with *Cox*.

Reasons for Granting the Writ

I

The decision below conflicts with the decisions of other courts of appeals as to the standard of care to be applied in personal injury suits under 33 U.S.C. 905(b).

The 1972 amendment to the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. 905(b), dissolved the tripartite litigation between longshoremen, shipowners and stevedore employers. As indicated by Chief Judge Kaufman in *Munoz* v. *Flota Mercante Grancolombiana, S.A.*, 553 F.2d 837 (2d Cir. 1977):

> the worker could recover only for injuries proximately caused by the shipowner's negligence, not unseaworthiness. The stevedore employer no longer could be impleaded and fear of the coercive effects of unequal bargaining power led Congress to prohibit involuntary indemnification accords. Federal Courts were to fashion a uniform law of negligence in future cases based not upon the doctrine of unseaworthiness but by analogy to landbased common law tort principles.

It was the intent of Congress that a uniform standard of care be developed. House Report No. 1441 (Education and Labor Committee) U.S. Code Congressional & Administrative News; 42 Cong. 2d Sess. Page 4698 et. seq. 1972.

With respect to the vessel's liability for injuries caused by "open and obvious conditions," when such a condition can be remedied by the independent contractor, there has been a complete division among the Circuits. The conflict is centered on the application of Sections 343-343A of the Restatement (37a) as the appropriate standard of care. The traditional land-based rule was that no liability attached to

the possessor for "open and obvious conditions." Section 343A, adopting the so-called modern trend, modified that rule.

In *Napoli* v. *TransPacific Carriers Corp.*, 536 F.2d 505 (2d Cir. 1976) the Second Circuit announced Section 343A as the standard of care in cases dealing with injuries to longshoremen under the amended statute. But that decision appeared to be limited in its application to those situations where the stevedore and the vessel owner were one and the same, i.e. where the vessel was the same as the possessor of land without the intervention of an independent contractor. The panel deciding *Lubrano* v. *Royal Netherlands SS Co.*, 572 F.2d 364 (2d Cir. 1978) indicated that it would not so limit *Napoli*. The decision in *Cox* however, limited the application of *Napoli* to a factual setting in which the vessel acts as its own stevedore. The majority in *Cox* indicated that it was following the Fourth Circuit opinions in *Anuszewski* v. *Dynamics Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976) cert. denied, 429 U.S. 1098 (1977) and *Riddle* v. *Exxon Transportation Co.*, 563 F.2d 1103 (4th Cir. 1977) which Judge Friendly cited in his dissent in the instant case. Judge Russell's comments in *Riddle* set forth the Fourth Circuit's open and obvious rule:

> However, even under the modern rule a vessel is not liable for "open and obvious" dangerous conditions, whether existing at time control of the vessel is relinquished by the vessel or arising afterwards with the knowledge of the vessel if the danger is such that the stevedore or shipyard would be expected to correct the condition in the course of discharging its responsibility for the safety of the longshoremen or shipyard worker.

The Fourth Circuit has rejected the Second Circuit's *Napoli* application of 343A under circumstances similar to those found in *Canizzo* and *Lubrano*. *Chavis* v. *Finnlines Ltd., O/Y* (4th Cir. decided May 22, 1978 Docket No. 77-1126).

The Third Circuit in *Hurst* v. *Triad Shipping Company*, 554 F.2d 1237 (3rd Cir. 1977) at page 1249 N. 35, cert. denied, 46 U.S.L.W. 3218 (1977), has also specifically disapproved the application of 343 and 343A. See also *Brown* v. *Ivarans Rederi A/S*, 545 F.2d 854, at page 863 N.10 (3rd Cir. 1976), cert. denied, 430 U.S. 969 (1977). The Fifth Circuit has followed the application of 343-343A without the limitation suggested in *Cox* and *Riddle* and Judge Friendly's opinion in *Canizzo*. *Brown* v. *Mitsubishi Shintaku Ginko*, 550 F.2d 331 (5th Cir. 1977); *Gay* v. *Ocean Transport & Trading Ltd.*, 546 F.2d 1233 (5th Cir. 1977). The Ninth Circuit has also adopted 343-343A. *Teofilovich* v. *D'Amico Mediterranean/Pacific Line*, 415 F.Supp. 732 (C.D.Cal. 1976). Judge VanPelt in *Davison* v. *Pacific Inland Navigation Co. Inc.*, 569 F.2d 507 (9th Cir. 1978) page 508 N.1, has set forth this split among the Circuits with respect to the standard of care to be applied in New Act cases.

There is no indication that there will be a resolution among the Circuits of the question of the appropriate and uniform standard of care directed by Congress to be applied in New Act cases. It appears that the conflict has been crystallized not only between the Circuits, but even among different panels of the Second Circuit.

As analyzed by Judge Friendly, if the responsibility of the contractors with respect to their obligations, both under the safety regulations and the applicable law, had been taken into consideration by the lower Court and by the majority of the panel, the complaint in *Canizzo* would have had to be dismissed. The lower Court only considered the responsibilities as indicated in 343A of Farrell to Canizzo. Congress did not intend to subject the vessel to liability in situations of this kind. The majority opinion suggests,

> We are faced, then with a difficult problem of line drawing which at this stage in the development of

> legal doctrine is best undertaken on a case by case basis. (7a)

The effect of the decision and the further expansion of 343A creates by indirection a non-delegable duty on the part of the vessel owner. This is pointed out clearly by the Third[2] and Fourth Circuits[3] and by the opinion in *Cox*. By applying Section 343A the Court effectively eliminated from consideration the responsibility of the independent contractors who have been entrusted with the primary duty to provide their employees with a safe place to work. 33 U.S.C. 941(b). *Marant* v. *Farrell Lines, Inc.*, 550 F.2d 142 (3d Cir. 1977). More importantly, Section 343A removes the incentive for the contractors to provide their employees with a safe place in which to work and circumvents the Congressional intent.[4]

Thus, the varying conflicts among the Courts of Appeals unresolved to date and which cannot be resolved by future litigation requires a determination by this Court as to the appropriate standard of care to be used in New Act cases.

The importance of such a decision can scarcely be underestimated in light of the great number of cases which are pending wherein longshoremen are seeking to recover damages for personal injuries and in which the verdict will depend on the Circuit in which the longshoreman was injured and/or the shipowner resides.

---

[2] *Hurst, supra* at p. 1249 N.35.

[3] *Riddle, supra, Chavis, supra.*

[4] The proper Restatement section as approved by *Hurst* and more recently in *Chavis* is Section 409 of the Restatement of Torts (Second). While the effect of Section 409 was alluded to by the majority (6a) they viewed its application as "too strict a view." Possibly this panel's concept that the workmen's compensation benefits were not adequate under the new scheme was the paramount consideration (9a N.3). This of course is not correct and contrary to the entire legislative history and statutory scheme.

II

The conflict in opinions between different panels of the Second Circuit Court of Appeals requires intervention by this Court and exercise of its supervisory powers.

The decision of the Court of Appeals in *Canizzo* cannot be reconciled with the decision of a different panel rendered three weeks previously in *Cox*. The plaintiff in *Cox* has filed a petition for a writ of certiorari. The majority in the instant case indicates,

> While each case must be determined on its own facts the result in Cox cannot reasonably be reconciled with the result here by the difference in the factual situations. (Footnote 3) (9a-b).

Judge Friendly states:

> While the majority disregards Cox because the opinion was handed down in the face of known disagreement by majority of this panel, our district judges can scarcely be expected to function with so discordant a chorus on this court (17a).

In footnote 7 Judge Friendly notes:

> Indeed the facts in Cox were stronger for the employees (17a).

In *Cox* there was evidence that the vessel had assumed the responsibility to place pins in the hatch beams and had retained control over that particular function. Plaintiff was injured when a hatch beam which allegedly was to be secured by the vessel's chief mate fell on top of him. The panel in *Cox* limited *Napoli* and refused to impute liability to the vessel because of a dangerous condition which the contractor could have remedied.

At the present time the District Judges in the Southern District cannot determine which standard of care is applicable in New Act longshore cases but more importantly, the "differences of opinion and known disagreements" which existed when these decisions were handed down require that this Court entertain its supervisory power and finally resolve this troublesome issue, so that a uniform standard of care can be utilized within this Circuit and the other Circuits.

III

The decision below raises significant and recurring problems concerning the standard of care to be utilized in New Act cases.

It has been indicated that various District Judges in the Southern District of New York have placed longshore actions on a suspense calendar until final resolution of the *Cox-Canizzo* conflict. In actuality the dispute among the various Circuits is exactly the same as can be found in *Cox* and *Canizzo.*

While not every case falls within the penumbra of *Cox* and *Canizzo,* the majority of longshore litigation throughout the country does require a resolution of the question of the applicable standard of care as it relates to "open and obvious conditions." The fact of the matter is that a different legal principle will be applied in the Third and Fourth as opposed to the Second, Fifth and the Ninth Circuits. Even more disconcerting is that the possibility that a verdict appealed to the Second Circuit would be decided based on the panel designated to review it as has happened with the two cases at hand. A vast amount of resources will be needlessly expended both in trial Judge time, lawyers' time and expenses, in cases in which the sole reason for litigation is the confusion as to the appropriate *standard of care.*

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

GEORGE W. SULLIVAN
Attorney for Petitioner
17 Battery Place
New York, New York 10004

JEFFREY V. BOXER
LILLY, SULLIVAN & PURCELL, P.C.
Of Counsel

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 346, 488—September Term, 1977.

(Argued December 8, 1977 Decided June 2, 1978.)

Docket Nos. 77-7292, 77-7332

ANTHONY CANIZZO,

Plaintiff-Appellee and Cross-Appellant,

v.

FARRELL LINES, INC.,

Defendant-Appellant and Cross-Appellee,

and

UNIVERSAL TERMINAL AND STEVEDORING CORP.,

Defendant-Appellee and Third Party Plaintiff,

FARRELL LINES, INC.,

Third Party Plaintiff-Appellant,

v.

FRANK J. HOLLERAN, INC.,

Third Party Defendant-Appellee.

(63408)

Before:

FRIENDLY, SMITH and MESKILL,

Circuit Judges.

Appeal from money judgment for personal injuries to longshoreman against shipowner in the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge.*

Affirmed in part, reversed in part and remanded for further proceedings.

JEFFREY V. BOXER (Lilly, Sullivan & Purcell, New York, N.Y.), *for Farrell Lines, Inc.*

RICHARD J. CARDALI (Cohen & Cardali, New York, N.Y.), *for Anthony Canizzo.*

ALBERT S. COMMETTE (Commette, Quencer & Annunziato, New York, N.Y., Robert K. Marzik, of counsel), *for Universal Terminal and Stevedoring Corp.*

JOHN T. SHEAN, New York, N.Y. (J. Robert Morris, New York, N.Y., of counsel), *for Frank J. Holleran, Inc.*

SMITH, *Circuit Judge:*

Farrell Lines, Inc. ("Farrell") appeals from a decision and order of the United States District Court for the Southern District of New York, Charles L. Brieant, Jr., *Judge,* finding Farrell liable for injuries sustained by appellee Anthony Canizzo in an accident on board Farrell's ship, the S.S. African Comet. The court found Farrell liable for damages in the net amount of $65,628.60, after a deduction which included $8500 per year for remaining earning ability and 40% contributory negligence, and Canizzo cross-appeals from this reduction in the damage award.

For the reasons adduced below, we affirm in part and reverse in part the judgment of the district court and remand the case for further proceedings consistent with this opinion.

I.

This suit commenced with the filing of a complaint against Farrell and Universal Terminal and Stevedoring Corp. ("Universal"), an independent stevedore loading cargo on board the African Comet on the day of the accident. Farrell impleaded Frank J. Holleran, Inc., Canizzo's employer, as a third-party defendant, and filed a cross-claim against Universal. Universal then filed a cross-claim against Holleran. The district court dismissed Canizzo's action against Universal, Farrell's cross-claim against Universal, Farrell's third party complaint against Holleran and Universal's cross-claim against Holleran.

On January 12, 1973, the day of the accident, Universal was employed by Farrell to load the African Comet. Holleran provided lashing and carpentry personnel to secure the cargo after it was loaded by Universal. Canizzo worked for Holleran as a carpenter. At approximately 5:00 p.m. Canizzo was instructed to move from one part of the ship to another in order to continue his work. In so doing, he was forced to traverse a narrow passageway between a locomotive stowed on the inshore area of the deck and a nearby hatch coaming. While walking through this passageway, Canizzo slipped on a patch of grease which was partially covered by a pile of wires which lay on the deck. Canizzo sustained permanent injury to his knee, and as a result, is unable to work as a marine carpenter or longshoreman. He is not, however, totally disabled.

The trial court found that the ship's crew placed cluster lights and their attached electrical wires in the passageway in question after 4:00 or 4:30 p.m., but at least one-half an hour before Canizzo's accident. The lights, wires, and other clutter which lay on top of the greasy deck created an "obviously dangerous" condition which would have been obvious to any prudent person. The court found that Farrell had actual or constructive notice of this condition inasmuch as the ship's personnel should have seen the grease on the deck when they put out the cluster lights. Furthermore, the crew should have anticipated that Canizzo would be unable to avoid the dangerous condition on the deck. This, the district court believed, was sufficient to bring Farrell within the negligence standard of § 343A of the Restatement (Second) of Torts (1965),[1] which was adopted in this court's opinion in *Napoli* v. *Trans Pacific Carriers Corp.*, 536 F.2d 505 (2d Cir. 1976).

The court found further, however, that Canizzo had been contributorily negligent in failing to walk with sufficient caution, or alternatively, in failing to avoid the wires by taking a different route to the No. 6 hatch. It was further held that Canizzo's damages were reduced, inasmuch as he was capable of earning $8500 per year. Accordingly, the trial court awarded Canizzo $109,381.00 reduced by reason of contributory negligence to $65,628.60.

II.

This suit is brought pursuant to the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33

1 Section 343A provides:

> (1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> . . .

U.S.C. § 901 *et seq.*, as amended. Amendments to the Act passed in 1972 increased levels of compensation payable to injured longshoremen, eliminated the doctrine of unseaworthiness as it pertained to shipowners, made a shipowner's negligence a necessary condition of his liability, and immunized independent stevedore-employers from liability in excess of compensation payments. In the words of the House Report:

> The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.
>
> . . .
>
> [But] the Committee believes that especially with the vast improvement in compensation benefits which the bill would provide, there is no compelling reason to continue to require vessels to assume what amounts to absolute liability for injuries which occur to longshoremen . . . who are injured while working on those vessels.
>
> . . .
>
> Accordingly . . . it would be fairer to all concerned . . . for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness.
>
> [Report of the House Education and Labor Committee, H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess., 1972 U.S. Code Cong. & Ad. News, 4698 at 4702-03.]

See *Lubrano* v. *Royal Netherlands Steamship Co.*, —— F.2d —— slip op. 1533 (2d Cir., Feb. 15, 1978); *Ruffino* v. *Scindia Steam Navigation Co.*, 559 F.2d 861 (2d Cir. 1977); *Munoz* v. *Flota Merchante Grancolombiana, S.A.*, 553 F.2d

837 (2d Cir. 1977); *Napoli* v. *TransPacific Carriers Corp., supra,* 536 F.2d 505; *Landon* v. *Lief Hoegh & Co.,* 521 F.2d 756 (2d Cir. 1975), *cert. denied,* 423 U.S. 1053 (1976).

Under the relevant provisions of the Restatement (Second) of Torts (1965), possessors of land, and hence shipowners, are liable for physical harm caused to invitees by dangerous conditions which are not obvious to the invitee (§ 343), but are absolved from liability when dangerous conditions are known or obvious, except when the possessor should anticipate the harm despite the invitee's knowledge or the obviousness of the condition. (§ 343A.)

Thus in *Napoli, supra,* we held that where a longshoreman had fallen from unsecured planks, there was sufficient evidence of the shipowner's knowledge of "obviously dangerous conditions" that were unlikely to be avoided by the longshoreman, that the case should have gone to a jury for a determination of the shipowner's negligence under § 343A of the Restatement (Second) of Torts. 536 F.2d 505.

A shipowner, however, can only be liable under § 343A if he knows or should have known of the obviously dangerous, but unavoidable, condition. *Ruffino* v. *Scindia Steam Navigation Co., supra,* 559 F.2d at 862; *Munoz* v. *Flota Merchante Grancolombiana, S.A., supra,* 553 F.2d 837.

While these principles are reasonably clear, considerable legal uncertainty remains in cases in which the negligence of a shipowner combines with the negligence of an independent stevedore to cause injury to a longshoreman. Similarly, when harm is caused by an independent stevedore given complete control over the loading of a ship, it is unclear whether, everything being equal, a shipowner is liable for that harm even when he has knowledge of the dangerous condition caused by the stevedore. See Restatement (Second) of Torts, §§ 409-429; *Lubrano* v. *Royal Netherlands Steamship Co., supra,* slip op. 1533 at 1539

(Mocre, *J.*, dissenting); *Hickman* v. *Jugoslavenska Linijska Plovidba Rijeka, "Zvir",* —— F.2d ——, slip op. 1459 (2d Cir., Feb. 2, 1978).

Too strict a view of a shipowner's liability in these situations would do much to diminish the salutary effects of the 1972 amendments by, in effect, making shipowners liable, once again, on what is akin to an unseaworthiness standard, but without recourse to contribution on the part of a negligent stevedore. Too lax a view would specifically contradict the congressional intention to make shipowners liable for their own negligence under the amended statute. See Report of the House Education and Labor Committee, H.R. Rep. No. 92-1441, *supra,* at 4701-02. We are faced, then, with a difficult problem of line drawing which, at this stage in the development of the legal doctrine, is best undertaken on a case by case basis.

In the instant case, the trial court found Farrell liable on either of two alternative legal theories. First, it found that the ship's crew placed cluster light wires on top of a patch of grease, thereby creating the dangerous condition which was the proximate cause of Canizzo's injury. Second, it found that, in placing the cluster lights on the deck, the crew observed or should have observed the greasy patch, and was therefore on notice of the obviously unsafe condition aboard ship.

These findings rest on the trial court's assessment of the credibility of plaintiff and of two of plaintiff's witnesses, Mazze and Trovato, both of whom were fellow employees and friends of plaintiff and both of whom had unrelated injury claims pending. The court found both biased in plaintiff's favor and rejected portions of the testimony of each, notably that of Trovato that a ship's officer had observed the dangerous conditions at 1:00 or 2:00 p.m. The court did, however, credit the testimony that the

grease, wire and cluster light wires existed in the area of the accident, that the grease was there at 1:30 or 2:00, and that the cluster lights had been placed on deck by the ship's company.[2]

These conclusions are based primarily on the weighing of testimony by the trier who had the opportunity to observe witnesses Mazze and Trovato on the stand and listen to them under direct and cross-examination, and we find no basis for setting them aside. The existence of a substantial area of grease in a narrow passageway, which should have been known to the ship's personnel, made more dangerous by the positioning by the ship's personnel of the cluster lights and wires upon the greasy area supports the finding of negligence on the part of the ship and justifies the plaintiff's judgment even under the new dispensation.

There is a strong presumption in favor of a trial court's findings of fact if supported by substantial evidence, *Pampillonia* v. *Concord Line, A/S*, 536 F.2d 476 (2d Cir. 1976), *Luigi Serra, Inc.* v. *SS Francesco C*, 379 F.2d 540 (2d Cir. 1967) (maritime negligence). Such findings may be set aside only if clearly erroneous. Rule 52(a), Fed. R. Civ. P. Where no substantial evidence supports a factual determination, it is clearly erroneous, and properly set aside. *United States ex rel. Paxos* v. *Rundle*, 491 F.2d 447, 452 (3d Cir. 1974); *Hodgson* v. *Fairmont Supply Co.*, 454 F.2d 490, 495 (4th Cir. 1972); *Shenker* v. *United States*, 322 F.2d 622, 624 (2d Cir.), *cert. denied sub nom. American Stevedores, Inc.* v. *Shenker*, 376 U.S. 907 (1963); *Apache Powder Co.* v. *Ashton Co.*, 264 F.2d 417, 422 (9th Cir. 1959); *Cleo Syrup Corp.* v. *Coca-Cola Co.*, 139 F.2d 416, 418 (8th Cir. 1943), *cert. denied*, 321 U.S. 781 (1944); see 5A *Moore's Federal Practice* ¶ 52.03[1]; 9 Wright & Miller, *Federal Practice & Procedure* § 2585 n. 8.

Here the question is not so much whether the evidence supporting the findings on liability is substantial as whether it is credible. We are not convinced that the determination of credibility is clearly erroneous, although a contrary ruling might have been supportable.

The judgment establishing the ship's liability must be affirmed.[3]

---

2 While the testimony concerning the cluster lights is to some degree vague and inconsistent, there is some substantial basis for the court to conclude that it was more probable than not that the crew put them out. The longshoremen had often worked this ship and were familiar with its lighting. Trovato testified that "they" put two lights near every hatch and that the ship owns the cluster lights, Canizzo that the crew takes care of them, Dennen (a Farrell witness by deposition) testified that they are owned by the ship, are ship's gear, are stowed adjacent to the hatch, are made available and are available to where they are needed. Holleran indicated hat they were ship's gear but usually hooked up by longshoremen. Davis, a ship superintendent for Universal, by deposition testified that the crew puts the cluster lights out and brings them to the hatch but that either the crew or Universal's men plug them in. There is no indication that the cluster lights in question had yet been hooked up.

3 *Cox* v. *Flota Mercante Grancolombiana, S.A.* was decided May 10, 1978, slip op. 2989ff, while this case was sub judice. *Cox* seems to us in conflict with at least *Lubrano* v. *Royal Netherlands S.S. Co.*, —— F.2d ——, slip op. 1533 (2d Cir. Feb. 15, 1978), among the decisions in this circuit.

While each case must be determined on its own facts, the result in *Cox* cannot reasonably be reconciled with our result here by the differences in the factual situations, for the proof of ship's negligence in *Cox* was at least comparable to that here. With all respect, however, we must disagree with the result in *Cox*. It appears to us to do what the Congress was unwilling to do, abolish the shipowner's liability to the injured longshoreman in negligence as well as in unseaworthiness. As Judge Friendly points out, liability of the ship for such negligence as a greasy deck attributable to the ship's company was specifically contemplated and thought to be preserved by the legislation.

Litigation in this troubled field would be tidier if the Congress had eliminated altogether the ship's possible liability to longshoremen. There are, however, other considerations.

Benefits under the Longshoremen's and Harbor Workers' Act have been considerably increased. We cannot overlook the fact, however, that as is usual under workmen's compensation schemes, they do not fully compensate for the loss suffered. If the ship, not a party to the em-

III.

The trial court found that because of Canizzo's experience as a carpenter and his above-average intelligence, he was capable of earning $8500 per year. While we do not quarrel with the court's estimation of Canizzo's intelligence, we are forced to conclude that it has taken an unfounded view of the employment potential of a 58-year-old, partially-disabled marine carpenter who has a history of heart trouble. While Canizzo may be capable of some employment, the record lacks any evidence as to its nature, availability or rate of compensation. The finding that he can earn $8500 per year until his retirement leaves this court "with the definite and firm conviction that a mistake has been committed" and that this finding is consequently clearly erroneous. *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Schley* v. *CIR*, 375 F.2d 747, 749-50 (2d Cir. 1967); Rule 52(a), Fed. R. Civ. P.

Accordingly, we must remand this case for redetermination of Canizzo's damages.

The court's dismissal of charges against Universal for failure of proof of Universal's negligence, and its dismissal of charges against Holleran, as forbidden by the terms of 33 U.S.C. § 901 *et seq.*, as amended, were correct.

The judgment of the district court is affirmed on the issue of liability, reversed on the issue of damages, and the case is remanded for further proceedings consistent with this opinion.

ployment contract, is absolved from liability for its own negligence, this uncompensated loss, which may be very great, is shifted from the negligent ship to the often innocent employee. The terms of the statute and the legislative history indicate to us that while Congress was willing to shift the burden of injury without fault to an improved compensation system for shore workers (who arguably never should have been classified with seamen anyway) it was not willing so to shift the burden of injury through the fault of the ship. This policy judgment we would leave to the Congress.

FRIENDLY, *Circuit Judge*, dissenting from the holding as to liability:

Courts must be exceedingly careful in defining the contours of the longshoreman's action for negligence against the ship, which was preserved by § 905(b) of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), lest too expansive notions of the ship's duty vitiate Congress' intent to do away with absolute liability for vessels (the "unseaworthiness" doctrine) and make greatly improved compensation benefits the primary remedy for longshoremen and harbor workers. Congress' objective, as is well known, was to curtail the triangular action whereby a longshoreman[1] who had already received compensation benefits from his employer[2] would bring a suit for unseaworthiness against the ship, which in turn would sue the employer. See *Munoz* v. *Flota Merchante Grancolombiana, SA*, 553 F.2d 837, 839-40 (2 Cir. 1977). Much of any recovery by the longshoreman would return to his employer's compensation insurer in satisfaction of its lien; another substantial portion would go to the plaintiff's lawyer and medical experts; and there would be a further transactional cost in the ship's recovery from the employer of its cost of defending against the longshoreman's suit. See, e.g., *McLaughlin* v. *Trelleborgs Angfartygs A/B*, 408 F.2d 1334 (2 Cir.), *cert. denied*, 395 U.S. 946 (1969). Unless the courts keep the longshoreman's negligence action against the ship within proper

1 For simplicity I shall generally use the word "longshoreman" to include all persons covered by the Longshoremen's and Harbor Workers' Compensation Act, and the word "stevedore" to include their employers, although plaintiff Canizzo was a marine carpenter. Cf. 33 U.S.C. § 902 (3) and (4).

2 Before the 1972 amendments these were often inadequate, see *Munoz* v. *Flota Merchante Grancolombiana, S.A.*, 553 F.2d 837, 839 (2 Cir. 1977).

bounds, the ship's situation will be worse in some respects than before since it will be deprived of its former third party action against the longshoreman's employer. Moreover, the increased compensation payments, which Congress conceived as the usual source of making the longshoreman whole, will absorb a still larger share of his recovery against the ship with consequent attenuation of any benefit to the injured worker. And all this despite the fact that the employer is generally in a far better position than the ship to prevent accidents to its employees. See *Lubrano* v. *Royal Netherlands S.S. Co.*, slip ops. 1533, 1546-47 & n. 7 (2 Cir. Docket No. 77-7211, Feb. 15, 1978) (Moore, *J.*, dissenting). Such a result would contravene the objective of Congress whereby

> . . . adequate workmen's compensation benefits . . . by assuring that the employer bears the cost of unsafe conditions, serves [sic] to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.

H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972), *reprinted in* 3 U.S. Code, Cong. & Ad. News 4698, 4699 (1972).[3] Nothing in the language of the statute or prior decisions of this court or others can justify imposition of liability on the ship under such circumstances as are presented here.

In retrospect it seems to have been a mistake for courts to give such talismanic significance to §§ 343 and 343A of the Restatement of Torts 2d as has sometimes been done. These sections are awkwardly drafted;[4] the framers had

3 Identical language appears in the Senate Report, No. 92-1125, 92d Cong., 2d Sess. 2 (1972).

4 Section 343A, on which liability is here sought to be predicated, is a statement of when the possessor is *not* liable.

no notion that they would be applied to the tangled situations of ship loading or unloading; and they must be read together with Chapter 15, "Liability of an Employer of an Independent Contractor". In dealing with § 905(b), courts would do better to consider the policies that actuated Congress in adopting the 1972 amendments. In my view Congress did not mean to subject the ship to liability for every dangerous condition known or knowable to it when it had a right to assume that this would be remedied by the employer, as § 941(a) requires. The typical cases where the ship was to be liable under § 905(b) would be for conditions of which it was or should have been aware but of which the employer was not and could not reasonably be expected to be and for affirmative acts of negligence for which the employer bore no responsibility (e.g., when the crew carelessly operated the ship's machinery used in loading and unloading or when such machinery was defective).[5]

Decisions in other circuits have emphasized the primary responsibility of the employer and the right of the vessel to assume that this will be discharged. The Third Circuit

5 This view does not run counter to the case stated in the House Report:

> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently failed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances.

H.R. Rep. No. 1441, *supra*, 3 U.S. Code Cong. and Ad. News at 4704 (1972). The crucial words are "willfully and negligently" and "in the exercise of reasonable care." Reasonable care does not require the ship to act if it could properly expect that the contractors who were constantly coming and going in the area would do so. See *Anuszewski* v. *Dynamic Mariners Corp., Panama*, 391 F.Supp. 1143, 1149 (D. Md. 1975), *aff'd*, 540 F.2d 757 (4 Cir. 1976), *cert. denied*, 45 U.S. 3571 (1977).

disapproved a jury instruction that "[t]he responsibility for the safety of the longshoreman lies concurrently or jointly with the longshoreman's employer, and with the shipowner." *Marant* v. *Farrell Lines, Inc.*, 550 F.2d 142 (3 Cir. 1977). Later, in *Hurst* v. *Triad Shipping Co.*, 554 F.2d 1237, 1250 n.35 (3 Cir.), *cert. denied*, 46 U.S.L.W. 3218 (1977), Judge Hunter noted that

> creation of a shipowner's duty to oversee the stevedore's activity and insure the safety of the longshoremen would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b). Every shipowner has the authority to oversee stevedoring operations. If that authority, without more, suffices to charge the shipowner with a responsibility for detecting unsafe methods of operations and warning the longshoremen about them, then shipowners will be back in their pre-1972 position.

The Fourth Circuit has taken a similar view. It approved a jury instruction that the primary responsibility for the safety of a repairman on a ship rested upon the shipyard and not upon the shipowner. *Riddle* v. *Exxon Transportation Co.*, 563 F.2d 1103, 1109 (1977).[6] After noting the

---

6 In support of this the court stated in footnote 9:

> See, for instance, *Ramirez* v. *Toko Kaiun K.K.* (N.D. Cal. 1974) 385 F.Supp. 644, 653; *Lucas* v. *"Brinknes" Schiffahrts Ges.* (E.D. Pa. 1974) 379 F.Supp. 759, 768.
>
> In the first case, the Court said:
>
> "The primary responsibility for the safety of a longshoreman lies with the stevedoring company."
>
> In *Lucas*, the Court said:
>
> "* * * It is clear, however, that Congress decided that the primary duty to provide a safe place to work is on the stevedore."
>
> In *Brown* v. *Ivarans Rederi A/S* (3d Cir. 1976) 545 F.2d 854, 860 (U.S. appeal pending), the Court said:

"modern" rule of a landowner's liability set forth in §§ 343 and 343A of Torts Restatement and applied by this court in *Napoli* v. *TransPacific Carriers Corporation*, 536 F.2d 505 (1976), Judge Russell went on to say:

> However, even under the modern rule, a vessel is not liable for "open and obvious" dangerous conditions, whether existing at time control of the vessel is relinquished by the vessel or arising afterwards with the knowledge of the vessel, *if the danger is such that the stevedore or shipyard would be expected to correct the condition in the course of discharging its responsibility for the safety of the longshoreman or shipyard worker.*

563 F.2d at 1111-12 (emphasis added). One author has written:

> The consistent philosophy of these decisions is that in the ordinary situation shipowners are in no position to learn of unsafe conditions or methods arising during the stevedore's operations; when the shipowners do learn of such dangers, ordinarily the stevedore and his employees will have an equal or greater awareness, so that the danger can be said to be open and obvious; and that the safety of stevedoring and other such operations is the primary and usually the sole responsibility of the stevedore.

Robertson, *Negligence Actions by Longshoremen Against Shipowners Under the 1972 Amendments to the Longshore-*

> "* * * However, express language in the statute and the legislative history reports accompanying the 1972 Amendments amply demonstrate that for reasons of policy the major responsibility for the proper and safe conduct of the work was to be borne by the stevedore.
>
> 563 F.2d at 1109 n. 9.

men's and Harbor Workers' Compensation Act, 7 Journ. Maritime Law & Commerce 447, 473 (1976).

No decision of this court requires us to ignore the ship's justifiable reliance on the independent contractors to perform their duty. *Napoli* v. *TransPacific Carriers Corp.*, *supra*, 536 F.2d 505, which the district judge regarded as the *fons et origo* of imposition of broad liability on the ship, did nothing of the kind. Where, as in that case, there is no independent contractor, it *is* part of the ship's duty to exercise reasonable care to inspect its own workers' workplace, to remove grease spills, etc. In such a case there is no "independent contractor" with primary responsibility upon whom the ship may properly rely. As the *Napoli* court rightly said in rejecting the district court's charge in that case.

> a charge which relieves a shipowner of liability for a dangerous condition which was "known to the stevedore or to any of its employees" is clearly inappropriate where the shipowner, itself, is the stevedore.

Napoli, *supra* at 508. Things are very different when the longshoreman works for an independent stevedore who has primary responsibility for the workplace. The decision of a divided panel in *Lubrano* v. *Royal Netherlands S.S. Co.*, *supra*, slip ops. 1533, is also distinguishable. In that case there was evidence of direct knowledge and participation of a ship's officer who "approved and joined in the direction that the men keep working, although the dunnage was not there." It was not a case where either the ship did not actually know of the danger and merely "should" have known, nor a case where at most the ship knew of the problem but could rely on others to alleviate it—in *Lubrano* the

court found that the ship's officer may have himself ordered the continuance of the dangerous situation.

In contrast this court has repeatedly recognized how far the ship may rely upon the independent contractor to rectify dangerous conditions that arise during loading and unloading. *Munoz* v. *Flota Mercanta Grancolombiana, S.A.*, *supra*, 553 F.2d at 840; *Ruffino* v. *Scindia Steam Navigation Co.*, 559 F.2d 861 (2 Cir. 1977); *Hickman* v. *Jugoslavenske Linijska Plovidba Rijeka, "ZVIR"*, 570 F.2d 449 (2 Cir. 1978). The last of this line of cases is *Cox* v. *Flota Mercante Grancolombiana*, Docket No. 77-7338, decided May 10, 1978, slip opinions 2989. There a unanimous panel directed dismissal of a complaint on facts which the majority properly concedes, see fn. 3, are indistinguishable from those in the instant case.[7] While the majority disregards *Cox* because the opinion was handed down in the face of known disagreement by a majority of this panel, our district judges can scarcely be expected to function with so discordant a chorus on this court.

The first basis on which the district judge and the majority would hold the vessel liable—knowledge of the accumulation of grease—is plainly untenable. When Farrell Lines engaged Universal to load and Holleran to lash the cargo, it was entitled to assume that they would perform the job in a workmanlike fashion, including compliance with the Safety and Health Regulations for Longshoring, 29 C.F.R. 1918.91(c), which require that "slippery conditions shall be eliminated as they occur," and place responsibility for compliance on stevedores. See 29 C.F.R. §§ 1918.2(a); 1918.3(c); *Brown* v. *Mitsubishi Shintaku Ginko*, 550 F.2d 331, 333 (5 Cir. 1977). If grease had ac-

7 Indeed the facts in *Cox* were stronger for the employee. There was evidence that placing pins in the beams was the ship's responsibility and that a mate had agreed with the hatch boss to supply them.

cumulated on the site of the accident for several hours, the responsibility for removing it or warning workers about it rested primarily on the independent contractors whose employees were regularly on the scene and were or should have been supervised, not on the ship. The ship would therefore certainly not have been negligent if it merely failed to discover the existence of the grease within the hours this assertedly was accumulating. Moreover, even if some unidentified ship personnel might have (or, as the district judge said even less convincingly, "should have") seen the grease when they were "pulling out" cluster lights to help the longshoremen and carpenters—assuming there was sufficient evidence for the judge to conclude that this had occurred, which I seriously doubt—this does not establish negligence on the part of the ship. First, any knowledge of the unknown deckhands about the grease would be imputable to Farrell Lines only if they had a duty to inform Farrell about it, ALI, Restatement of Agency 2d § 272, which they may not have had, see *id.* at § 275 illust. 6, unless, for example, they were ship's officers, for which there was no proof at all. Moreover, even if the ship could be said to have had constructive notice of the condition, there was no reason to think that the independent contractors who were primarily responsible for eliminating or warning about it would not take care of the pro' lem as they were bound to do. This is particularly so since, as the district judge noted, Trovato, a Holleran employee and witness for Canizzo, said he saw the grease at 1:30 P.M. and hence could have reported the condition to his employer for corrective action.

There is likewise no merit in the alternative theory that the ship's deckhands aggravated the danger by placing the cluster lights on top of the grease and this aggravation was a substantial factor in causing Canizzo's injury,

ALI, Restatement of Torts 2d §§ 430, 431. In the first place, there was no sufficient evidence to support this. Even if the testimony were deemed adequate to sustain the conclusion that the lights were brought out by deckhands rather than the longshoremen, there is no evidence that deckhands were responsible for placing them where Canizzo fell. Also, if the deckhands had placed the lights precisely at that spot, there were wires on the deck before the cluster lights were put out and Canizzo made no claim that he would not have fallen except for the lights. In his contemporaneous accident report he made no mention of the cluster lights, saying only that he "tripped over debris (old gear and wire)," and at trial his account of the accident was simply that he noticed grease on his overalls and shoes after his fall and that on the deck "there was a few wires there, with grease on them, and cluster lights with the wire hanging, you know, all messed up." The basic cause of Canizzo's slipping was, of course, the grease; its removal was the primary responsibility of the independent contractors, not of the ship. Beyond this, if the cluster lights in fact aggravated the danger caused by the grease and the wires, Canizzo's employer had the responsibility and the opportunity to place them elsewhere and the ship was entitled to assume that it would.

The judgment should be reversed with instructions to dismiss the complaint.

Opinion of the District Court.

FINDINGS AND CONCLUSIONS

BRIEANT, J.

This action, tried before me without a jury on November 22 and 23, 1976, arises out of a claimed personal injury suffered by plaintiff Anthony Canizzo, a marine carpenter, on January 12, 1973 aboard the S.S. AFRICAN COMET.

Plaintiff was employed by third-party defendant Frank J. Holleran, Inc. ("Holleran"). Defendant Farrell Lines, Incorporated ("Farrell") was the owner of the AFRICAN COMET, and defendant Universal Maritime Service Corp. ("Universal", sued herein as Universal Terminal and Stevedoring Corp.) was the loading stevedore.

The COMET was being loaded at Pier 5, Furman Street, Brooklyn, New York.

This is a so-called "new law" case, regulated by the Longshoremen's and Harbor Workers Compensation Act Amendments of 1972, effective November 26, 1972, 33 U.S.C. § 901, *et seq.*

The complaint was filed January 23, 1973, and seeks damages for personal injuries said to have arisen out of a failure "to give the Plaintiff a safe place to work when Plaintiff was caused to fall as a result of debris, wires and a slippery substance resembling oil, causing Plaintiff to sustain serious, severe, crippling, permanent and progressive personal injuries." (Complaint, ¶ Seventh).

Plaintiff also pleads as a second cause of action that the AFRICAN COMET was unseaworthy. Such a pleading no longer states a claim. See 33 U.S.C. § 905(b), as amended effective November 26, 1972.

Both Farrell and Universal were sued directly by plaintiff. By its amended answer, Farrell denied any negligence and pleaded the affirmative defenses of contributory

negligence; that the danger was open, obvious and well known to plaintiff, and caused by risks assumed by plaintiff at the time he entered upon his employment; that the sole cause was the negligence and carelessness of plaintiff's own employer, its agents, servants and employees; and also raised other defenses not material to our discussion here. Farrell's amended answer also sought contribution among defendants; sought contribution from Holleran as a joint tortfeasor, or alternatively, indemnity, and claimed the benefit as an equitable contribution of the amounts of workmen's compensation benefits paid by Holleran to its employee, plaintiff here. Farrell also sought indemnity on various grounds from Universal.

Universal in its amended answer has asserted a cross-claim against Holleran and Farrell, claiming that any liability arose out of a breach by Farrell of its duty to provide the plaintiff with a safe place to work, and also by reason of the negligence of Holleran in creating a dangerous condition, or by plaintiff's contributory negligence to be imputed to Holleran.

Further detailed recital of the allegations of the various parties in their pleadings is not presently necessary, and they are to be deemed incorporated by reference.

The Accident

Plaintiff, then 55 years of age, and having had more than 35 years experience as a marine carpenter working in the Port of New York, was employed on January 12, 1973 by Holleran. Holleran had been retained to provide carpenters and lashers, working as separate gangs, in connection with loading the AFRICAN COMET.

The COMET was moored starboard side to Pier 5. A General Electric diesel locomotive, one of four being carried by the COMET, had been loaded. This locomotive had been stowed on the weather deck, between hatches Nos. 5 and 6 on the starboard side. The locomotive was placed on top of timbers intended as shoreing, and to distribute its

weight. The timbers had been placed by Holleran's carpenters. Holleran's lashers were engaged in lashing the locomotive to the deck, using chains and possible wires, and were also doing other lashing work in the vicinity of hatches 5 and 6.

Shortly after 5:00 o'clock in the afternoon, while walking on the weather deck in a space, described as an alleyway, next to the locomotive, and while passing from hatch 4 to hatch 5, Canizzo fell.

In his accident report given to his employer Holleran on January 15th, Canizzo gave the hour of the accident as 5:15 p.m., and according to the accident report, stated: "while working on deck, walking between 5 and 6 hatches starboard side, he tripped over debris, old gear and wire, and fell, inj. right arm and left knee." The nature of the injury as described in the accident report is: "contusion of right shoulder, elbow, hand, wrist—contusion of left knee." The first notification to Holleran of this incident occurred January 15, 1973. Mr. Holleran testified that on the following Monday Canizzo told him he had fallen over "old gear and wire."

Plaintiff arrived at the emergency room of the Lutheran Medical Center in Brooklyn at 6:00 p.m. on January 12, 1973. The emergency room report (Ex. A), which lists plaintiff's employer as "Hallorry Lumber Co.," shows "patient statement—while at work tripped on ship deck and injured right shoulder and knee, pier 5 Port Authority on African Comet." The findings on examination were "tenderness over right shoulder, arm, forearm and hand with slight limitation of motion." The impression or diagnosis was "contusion of upper extremity." An X-ray taken on January 12th at Lutheran Medical Center showed no evidence of fractures, dislocation or any other bone or joint abnormalities of the right shoulder, humerus, hand and forearm. There was no X-ray taken of the knee, and no notation made with respect thereto.

A contemporaneous entry in the ship's deck log confirms the occurrence of the fall.

At trial Canizzo testified that while walking through the "alleyway," after he had taken a few steps, "I slid and I stumbled, and I tried to get my balance; I couldn't, and I fell over on my hands and knees, hurting my right hand and my left leg." (Tr. p. 15). He stated that he noticed grease on his overalls and shoes after the fall, and that on the deck "there was a few wires there with grease on them and cluster lights with the wire hanging, you know, all messed up."

The area was not well lighted. Dusk was approaching and the cluster lights had been taken out by ship's personnel in preparation to rigging them for continued cargo work. Other persons had walked through the alleyway in the same manner as Canizzo, and had negotiated the area without injury.

William R. Davis, Universal's ship superintendent, testified that he walked down the alleyway, approximately three feet in width, between the locomotive and the coaming of the No. 6 hatch. He did so at 4:00 or 4:30 P.M., at a time when it had not yet turned dark. He found the passageway clear. Lashers employed by Holleran were working near the locomotive. Davis testified that the crew, rather than Universal puts out the cluster lights when requested by stevedores. I find that the cluster lights were so placed by Farrell's personnel after Davis' visit, but at least half an hour before Canizzo's injury and probably longer.

The Court regards the situation as presenting a clear case of *Napoli* negligence [*Napoli* v. *Trans Pacific Carriers, etc.* (Hellenic Lines), 536 F.2d 505, 507 (2d Cir. 1976)]. Farrell, as owner of the COMET was required to exercise reasonable care to furnish plaintiff with a reasonably safe place to work. The condition on the deck at the point where longshoremen and other harbor workers would be

required to walk between the locomotive and the hatch coaming, as an alternative to taking a longer route around the hatch, was obviously dangerous by reason of the presence of wires, lights and clutter, which covered the deck surface, below which there was grease. It was obvious to any prudent person that the deck condition was such as to require careful walking, or alternatively, taking a different route.

The condition was so open and obvious that it should have been observed. I find that there was prior notice of the condition to the shipowner. In so finding, I am relying in part upon the obviousness of the condition, and in part on testimony to the effect that the cluster lights, which are part of the ship's equipment, and ordinarily rigged under the supervision of the Mate, were a contributing part of the condition. In placing the cluster lights in the alleyway, ship's personnel should have seen the grease.

Within the rule of *Napoli, supra,* the ship should have reasonably anticipated that Canizzo would not be able to avoid the danger, despite its obviousness, and the vessel might reasonably anticipate that he would use the "alleyway" despite its obvious danger, since the only alternative would be to take a longer way around. I find that the shipowner was negligent in not correcting the open and and obvious danger, a portion of which was created by the shipowner's employees.

Plaintiff also was contributorily negligent, in that he proceeded into a cluttered area where grease was likely to be associated with the wires and cluster lights, and failed to walk cautiously, make an observation of the footing, or take a longer route around. That with caution he could have negotiated the obvious danger, appears from the fact others had walked through the "alleyway," immediately prior to Canizzo's injury, and had done so without injury to themselves.

Plaintiff testified that Valentino Trovato was working as a lasher and had come over to help him when he fell, and that Salvatore Mazze, who had been walking behind, also had helped him when he fell.

In his accident report, given prior to the litigation, Canizzo says that he "tripped" over the wires on the deck. At trial he testified that he had stepped over and between the wires, and slipped on the grease which the wires concealed. The Court does not attribute this difference in the account given as representing a tendency on the part of Canizzo to exaggerate, or trim his story, to suit some legal theory. I conclude rather that he regarded the two as one, and that in fact he probably did trip over the wires, his foot landed on a greasy substance and he fell. I am inclined to credit his testimony as truthful to the effect that his right foot slipped after he had stepped into the area where the wires were.

The Court observed Mr. Canizzo's demeanor on the stand. Apart from the natural suspicion which attaches to "grease spot cases" in this Court, there was no basis to regard his testimony as incredible, and I find that he testified truthfully at trial.

Salvatore Mazze testified on plaintiff's behalf and corroborated his testimony generally. He too was a marine carpenter employed by Holleran. He witnessed the accident and saw the grease, wire and cluster lights in the so-called alleyway. He claimed also to have seen rope preventers and guy lines in the area of the cluster lights and the electric wires. This I do not believe. Mazze has been a friend of Canizzo for thirty years. Mazze's credibility is suspect, not only because of his friendship for plaintiff, but because he in turn has an accident case pending in this Court, and, by coincidence, Mr. Canizzo is the eye-witness in Mazze's personal injury claim case. Because of his bias, his testimony is entitled to slight weight.

Valentino Trovato also testified for plaintiff. He too was employed as a lasher by Holleran on the date of the accident. He testified that he saw bundles of wire between the 5 and 6 hatch, and also testified that he saw grease covering a space of five or six feet, occupied by the wire, with the grease underneath the wire. He observed this condition between 1:00 o'clock and 2:00 o'clock. He saw cluster lights of the ship on top and "grease on what he fall down on." (Tr. p. 143).

The locomotive had been loaded at about 1:00 o'clock. Universal loaded lashing gear on deck at hatch No. 5 for Holleran at 2:30 in the afternoon, for use in connection with lashing the locomotive. Trovato testified that the Cargo Mate, or Chief Mate of the vessel observed the conditions at 1:00 or 2:00 o'clock. I do not credit this testimony as truthful. Trovato also was a client of plaintiff's attorneys, and had brought two separate actions in this Court, one of which had been settled, and the other pending. He was biased in plaintiff's favor. However, it makes no difference, since I find the conditions described existed in the so-called alleyway for a long enough period so that the vessel knew or should have known of its existence, within the doctrine set forth in *Napoli, supra,* and part of the condition, with respect to cluster lights was created by the ship's personnel.

I find that Farrell was negligent. Its negligence above described, together with plaintiff's contributory negligence in failing to walk carefully and watch where he was going, were the proximate cause of the injuries.

There was no negligence shown on the part of Universal. There is no evidence that Universal undertook any activity with respect to the cluster lights or the electric wires associated with them, and no evidence that Universal caused the presence of the grease. As to the grease, it is equally likely that the grease was caused by Holleran, as by Universal, or the ship's crew.

The negligence of Holleran in failing to provide its employee with a safe place to work is barred in the first instance by the complete remedy of compensation. Under the statutory amendments, no claim over exists in favor of Farrell Lines against Holleran or Universal. 33 U.S.C. §905(b). No negligence by Holleran's lashers was shown.

The Injuries

At the Lutheran Hospital plaintiff was not treated for his knee. He first saw Dr. Lanier for his knee on April 6, 1973. An orthopedic surgeon with 25 years experience and all of the usual credentials, Dr. Lanier, after taking a case history, took X-rays of all of the injured areas. The X-rays were negative. Dr. Lanier's initial diagnosis was that the injury on the right hand and right shoulder were mild, and did not require any particular therapy, but he believed that the left knee showed signs of a torn medial cartilage. He found plaintiff unable to do a full knee bend, and that there was atrophy of the left thigh and of the left leg indicative of limited use due to pain. The medial cartilege situated between the femur and the tibia is a cushioning mechanism for the knee, generally round in shape and found under the meniscus.

An arthrogram in May of 1973 was negative, but Dr. Lanier reached the conclusion that in spite of the negative X-rays and arthrogram, plaintiff, in view of his vociferous complaints, would probably require surgery for the left knee. Plaintiff was given a left knee brace to rest his knee, and physical therapy, and later, on June 27th, a cast was applied to the knee for the purpose of immobilizing the point of injury.

Plaintiff's continued complaints ultimately led to surgery on September 12, 1973 at Flatbush General Hospital. Dr. Lanier testified that he made "an incision over the left knee carried down to the medial meniscus, which is subjacent. I

noted there was a hypermobility of the anterior portion of the medial meniscus, and that immediately explained to me why the arthrogram was negative . . . because if you don't have a frank tear, that may be one reason why an arthrogram is negative and yet surgery can be effacacious, because of looseness of the anterior attachment, which is a relatively common occurrence in knee problems, and on this basis I removed the medial meniscus."

Dr. Lanier testified that following surgery Mr. Canizzo "did fairly well" and received physiotherapy following the operation.

At the time of trial, Mr. Canizzo continued under Dr. Lanier's care, still claimed to suffer pain in his knee, but had improvement in motion. Dr. Lanier believed that the surgery had the ultimate result of being "satisfactory as regards walking around, having less pain, less swelling, less buckling."

In February 1974 plaintiff was readmitted to Flatbush General Hospital under Dr. Lanier's care for the purpose of a manipulation of his knee to improve motion and pick up additional degrees of flexion. On February 25th he was discharged, still with pain over the scar on the knee, feelings of stiffness and a limp while walking. Dr. Lanier reports weakness of the quadriceps muscle, a problem commonly following knee surgery, and symptoms of damage to the lateral cartilage of the left knee, including abnormal sounds on palpation. Dr. Lanier diagnosed a diseased meniscus, and continued physiotherapy.

Although plaintiff's condition suggests further surgery, Dr. Lanier believes that it would be unwise to engage in such second operation at this time, "only because two operations on the knee are just two traumatic insults to a knee, and the knee just doesn't tolerate that much surgery."

Dr. Lanier testified that the accident was a competent producing cause of the injuries. Dr. Lanier believed that the condition was permanent because three years after the

accident and following the surgery there is still restriction of the left knee, complaints of swelling, intermittent weakness, pain and adventitious sounds. He has prescribed medication, restricted activity, and use of an elastic bandage.

Dr. Lanier suggested that continued annual periods of physiotherapy were needed, and this would cost about $20,000.00 for plaintiff's foreseeable future life. As to this item, I believe the treatments would have no beneficial effect, and decline to find this element of damage.

On the cross-examination of Dr. Lanier, it appeared that the initial diagnosis before the operation had been a ruptured medial meniscus, and that the operation showed that Mr. Canizzo did not in fact have a ruptured medial meniscus, but rather had a "hypermobile medial meniscus" in that the ligaments were loosened from the peripheral attachments.

Dr. Balensweig, a qualified orthopedic surgeon testifying for the defendants, did, on examination of plaintiff, find a slight thickening of the lining of the joint and a trace of fluid on the left knee. He found no instability, but did find crepitus in the left knee cap. He found some arthritis changes in the left knee and the usual post-operative conditions of nerve damage. Dr. Balensweig defined a "hypermobile medial meniscus" as "an assumption of physicians when they don't find anything and they believe that the patient has trouble with the knee". His testimony was illuminating (Tr. p. 342):

> Q. What is it (hypermobile medial meniscus) supposed to define?
>
> A. It's supposed to mean a tear of the attachments of the meniscus to the tibia, making it too loose.
>
> Q. In other words it is a looseness?
>
> A. It's supposed to be a looseness. However, the only time we find tears of the attachments of the meniscus that we can believe is when we have a severe injury to the knee with a tear of the radial collateral ligament, and then the meniscus is ripped loose from its attachment, shifted into the joint, and it is way away from its attachments. "If you get a so-called peripheral tear, which you can get, as it heals it can scar down and become hypermobile. It's a wastebasket term, used in orthopedics to explain your mistake in surgery".

Dr. Balensweig believed, and I find, that the operation to the meniscus was the result of a mistaken diagnosis, and an unnecessary operation. Be that as it may, the operation and its results flow from the accident, since it is foreseeable that a person injuring his knee in a fall may, even with a negative arthrogram, a procedure only about 80% accurate, be diagnosed as in need of surgery and may submit to surgery for a torn meniscus, resulting in a post operative diagnosis of hypermobility, the so-called wastebasket term.

In Dr. Balensweig's words (Tr. p. 245) "so, as I said before, it is a term that has crept into orthopedics to explain the 10 or 15% of so-called normal knees that you operate on, where they have symptoms of a torn cartilage and you find nothing, and you say 'well it must have been hypermobile'." But, Dr. Balensweig himself found that Canizzo had a disability, as a result of excess new bone formation in the infrapatellar tendon, which appeared to him to be a post-operative reaction, and he had a low grade synovitis of the knee. Dr. Balensweig also found that the patient had a "myositis ossificans" type of reaction, post-surgically, in the lower end of the incision, and that he would have difficulty kneeling and squatting for more than very brief periods.

Dr. Balensweig testified, and the Court finds, that Canizzo can drive a car, a fact which he himself admits, and can do work requiring limited amounts of walking and standing with sufficient rest periods.

I conclude and find that as a result of the injury and consequent on the decision to operate on the knee (which was reasonable when made, although hindsight shows the sur-

gery unnecessary), plaintiff has a permanent disabling condition in his knee. Plaintiff is not physically fit to perform the duties of a marine carpenter, which require considerable walking and climbing of ladders 60 feet or longer and walking over and across dunnage and other irregular surfaces. This condition prevents totally his employment as a marine carpenter or longshoreman. However, because he can operate an automobile and can stand and walk for periods of time with intervening rest periods, he is in no sense totally disabled from an economic point of view.

I find that plaintiff was injured by falling much in the manner in which he described, while walking between the hatch coaming and the locomotive on the AFRICAN COMET, that his injuries were due to the presence of a greasy substance, cluster lights, electric wires and possibly lashing wires, on the deck, although the presence of the lashing wires is not shown by a preponderance of credible evidence. I find that the danger was open and obvious, and that the shipowner was negligent in not correcting it, and that the shipowner had actual or constructive notice.

Mitigation of Damages

During the period of more than four years which has elapsed since his injury, plaintiff has not engaged in training for any other job. He stays home, relaxes and watches television. Apparently, he is not planning to seek employment. He takes the attitude that because he is 58 years old, he need not do so. (Tr. p. 24).

Canizzo has a substantial career experience as a marine carpenter. He is a personable individual, whose intelligence appears to be better than average. He has occupied a position of importance in his labor union. Apparently, he intends to retire. Although he had a heart attack in April 1976, unrelated to his injuries here, the Court would expect that Mr. Canizzo could devote himself to some productive work, and believes that parttime sedentary em-

ployment within the City could be found by him, either immediately, or after suitable career counseling.

Under familiar legal principles, it is his duty to mitigate damages by attempting to work, and the Court finds that for purposes of this action, he could earn income, without undue hardship, and even with his history of a heart attack, of at least $8,500.00 per year.

The Court fixes the contributory negligence of Mr. Canizzo in failing to walk carefully and watch where he was going at 40%, and the balance of the negligence is attributable to Farrell, or 60%.

Plaintiff's earning capacity was approximately $16,000.00 per year at the time of the accident. Since then marine carpenters can expect to earn more. He was totally disabled for a period of about 14 months. Thereafter he continued to be permanently disabled from the performance of his job as a marine carpenter, but is able to perform other work. With proper vocational counseling, which he should have sought on his own incentive when advised that his knee would not improve further, I find that plaintiff can earn the sum of $8,500.00 per year hereafter, compared with current marine carpenter's earnings of $19,000.00. His losses and damages are computed as follows:

Salary lost while permanently disabled	$ 18,666.00
Difference in salary between work as marine carpenter and value of sedentary job, for work expectance of approximately nine years, total of $94,500.00 reduced to present value at 6% rate	64,260.00
Medical and related services rendered	6,455.00
Pain and suffering, loss of enjoyment	20,000.00
Gross Total	$109,381.00

The foregoing gross amount is reduced by reason of contributory negligence to the net sum fixed by the Court at $65,628.60.

The foregoing constitutes the findings of fact and conclusions of law of the Court pursuant to Rule 52, F.R.Civ.P.

Settle judgment on five (5) days notice disposing of all claims, cross-claims and third-party actions in accordance with the foregoing.

Dated: New York, New York
April 13, 1977

CHARLES L. BRIEANT
Charles L. Brieant
U. S. D. J.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of June one thousand nine hundred and seventy-eight.

Present: HON. HENRY J. FRIENDLY
HON. J. JOSEPH SMITH
HON. THOMAS J. MESKILL
Circuit Judges,

77-7292
77-7332

ANTHONY CANIZZO,
Plaintiff-Appellee and Cross-Appellant,

v.

FARRELL LINES, INC.,
Defendant-Appellant and Cross-Appellee,

and

UNIVERSAL TERMINAL AND STEVEDORING CORP.,
Defendant-Appellee and Third Party Plaintiff,

FARRELL LINES, INC.,
Third Party Plaintiff-Appellant,

v.

FRANK J. HOLLERAN, INC.,
Third Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is affirmed in part, reversed in part and the action be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court, with costs to be taxed against the defendant-appellant and cross-appellee Farrell Lines, Inc. in favor of plaintiff-appellee and cross-appellant Canizzo.

A. Daniel Fusaro,
Clerk

By Arthur Heller
Deputy Clerk

Restatement (Second) of Torts § 343-343A (1965).

§ 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

§ 343A. Known or Obvious Dangers

(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

(2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.